Petition

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

81-1245

In the Supreme Court of the United States

October Term, 1981
No. .....

UNITED STATES OF AMERICA,
Respondents,
v.
RICHARD MARCHESE,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Certiorari should be granted to determine if the decision in this case by the Court of Appeals for the Third Circuit which permitted references to photos of Petitioner throughout the trial implying prior criminal activity is in conflict with the decision of this Court in *U.S. v. Michelson*, 335 U.S. 469 (1948), the decision of the D. C. Circuit in *U.S. v. Barnes*, 365 F.2d 509 (D.C. Cir. 1966), and the Seventh Circuit in *U.S. v. Reed*, 376 F.2d 226 (7th Cir. 1967).

II. Whether Certiorari should be granted to determine whether the decision by the Court of Appeals for the Third Circuit in not reversing the conviction in light of exculpatory material withheld by the prosecution was in conflict with the decision of this Court in *Brady v. Maryland*, 373 U.S. 83 (1963).

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OPINION OF THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA:

The opinion of the Honorable Donald E. Ziegler was made orally on February 6, 1981 in response to Petitioner's written post-trial motions and is contained, in relevant parts, in the Appendix hereto.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

The Third Circuit, at No. 81-1431, in a Judgment Order issued September 24, 1981, affirmed the judgment of the District Court. In addition, the Third Circuit denied Rehearing in the case in an Order issued November 3, 1981. These orders are contained in the Appendix hereto.

JURISDICTION

The judgment sought to be reviewed by this Court was issued by the Court of Appeals on September 24, 1981. The determination of the Court of Appeals denying Petitioner's request for rehearing was made on November 3, 1981.

Jurisdiction of this Court to review the determination of the United States Court of Appeals for the Third Circuit is given by 28 U.S.C. §1254(1). This petition is being made by the defendant in the cause below, a party to the said action.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall . . . be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

On February 9, 1979, the Petitioner was arrested by Secret Service Agents via an information for allegedly passing counterfeit bills on February 6, 1979, in Pittsburgh, PA. On March 20, 1979, Petitioner was indicted for the February 6 alleged passing as well as an alleged passing in Youngwood, PA on February 5, 1979. In July of 1979, the Petitioner was acquitted of the passing in Pittsburgh on February 6, 1979.

Petitioner proceeded to trial on January 5, 1981, on two counts relating solely to the alleged passing of one counterfeit bill in Youngwood, PA on February 5, 1979.

The government presented one substantive witness, a Diane Klingensmith who testified that Petitioner passed a counterfeit $100 bill in a grocery store in Youngwood, PA where she was the cashier. In pre-trial discovery and in the government's Rule 12.1 alibi information, the time of the alleged passing was stated by the government to be between 7:40 and 8:20 P.M. on February 5, 1979.

At trial, however, the witness Klingensmith testified that the bill was passed between 7:00 P.M. and 8:00 P.M. on February 5, 1979. This was of particular significance in that Petitioner offered the testimony of five (5) alibi witnesses who testified that at around 8:00 P.M. the Petitioner and his wife entered a restaurant about fifty miles away from the site of the passing. It was clear from the testimony that if the passing was made between 7:40 and 8:20 P.M. the Petitioner could not have been the passer if he were in the restaurant 50 miles away at 8:00 P.M.

However, if the passing were at 7:00 P.M., which is the earliest time that witness Klingensmith testified *at*

trial that it may have been, it is unlikely but possible that Petitioner passed the bill and then sped to the restaurant 50 miles away where he arrived at 8:00 P.M.

At argument on post trial motions, counsel for Petitioner was discussing in an unrelated issue, the variance regarding the time of the passing in the witnesses' trial testimony (between 7:00 - 8:00) versus the government's pre-trial statement to Petitioner (between 7:40 - 8:20). The U.S. Attorney, to rebut, stood up and stated to the Court that he was also surprised at trial of Petitioner to hear the government's witness testifying that the passing may have been as early as 7:00 P.M. because in interviews he had with the witness shortly before trial, she stated that the passing was between 7:40 P.M. and 8:20 P.M.

The government, however, after hearing this variance in their witness' testimony never made Petitioner award of the witness' earlier conflicting statement that was so material to the Petitioner's defense.

Petitioner promptly filed an amended motion for a new trial alleging a *Brady* violation. This was denied by the Court.

In addition, at trial, the same government witness was shown on direct examination a photo array from which she had selected Petitioner's picture on February 13, 1979, a week after the passing, as the one who might have passed her the bill. The photos of Petitioner shown to the witness were taken of Petitioner after an earlier counterfeiting arrest (February 9, 1979) by the Secret Service for which he was acquitted. This arrest was one month earlier than the arrest for the passing in the instant case.

The picture of Petitioner was introduced into evidence and shown to the jury over defense objection. And while the picture was not a mug shot and by itself did not imply prior criminal activity, the purpose of using a regular photo to avoid speculation regarding prior criminal activity was defeated when the government made repeated references, all over objection, to the fact that the picture was taken by *Secret Service Agents* prior to the arrest on the instant charges.

Petitioner's objections that this information created implications of prior criminal activity were denied by the Court. Petitioner was convicted and his post-trial motions were denied.

ARGUMENT

I. The Decision In This Case By The Court Of Appeals For The Third Circuit Which Permitted References To Photos Of Petitioner Throughout The Trial Implying Prior Criminal Activity Is In Conflict With The Decision Of This Court In *U.S. v. Michelson*, 335 U.S. 469 (1948), The Decision Of The D.C. Circuit In *U.S. v. Barnes*, 365 F.2d 509 (D.C. Cir. 1966), And The Seventh Circuit In *U.S. v. Reed*, 376 F.2d 226 (7th Cir. 1967).

It is well established that evidence of other offenses and prior trouble with the law is inadmissible in a criminal prosecution. *U.S. v. Michelson*, 335 U.S. 469, 475-476 (1948). An example of this principle is found in the cases which hold the use of the term "mug shots" in references to photos of an accused creates undue prejudice in that such reference denote prior criminal activity and are thus inadmissible. *U.S. v. Barnes*, 365 F.2d 509 (D.C. Cir. 1966); *U.S. v. Reed*, 376 F.2d 226 (7th Cir. 1967).

In the instant matter, while a traditional mug shot of Petitioner was not presented in court and while the term "mug shot" was not spoken, the whole point of avoiding reference to the term mug shot was totally and completely defeated by the repeated references to the fact that the pictures of Petitioner Marchese were taken by Secret Service agents and prior to his identification and arrest in this case.

This was done several times throughout the trial, including the testimony of the last witness—a government rebuttal witness, Secret Service Agent Dana Brown, who again reminded the jury that he had taken Petitioner's picture and he had done so prior to Petitioner's arrest and identification in the instant matter.

Further, no purpose was served by any of this testimony and all references to the *source* of the photos and *when* they were taken could have been eliminated. See *U.S. v. Harrington*, 490 F.2d 487, (2d Cir. 1973), *U.S. v. Foster*, 568 F.2d 207 (1st Cir. 1978).

The well entrenched principle established by this Court and articulated in *U.S. v. Michelson, supra*, that prior criminal activity is an irrelevant factor in determining future guilt, is violated by the decision of the Court of Appeals in this case. As such, Petitioner respectfully requests that Certiorari should be granted to resolve this conflict.

II. The Decision By The Court Of Appeals For The Third Circuit In Not Reversing The Conviction In Light Of Exculpatory Material Withheld By The Prosecution Was In Conflict With The Decision Of This Court In *Brady v. Maryland*, 373 U.S. 83 (1963).

As is set forth clearly in the Statement of the Case, *infra*, the government possessed a statement in the case from witness Klingensmith that materially conflicted with her testimony at trial regarding the time of the passing of the bill in question. Her pre-trial statement to the U. S. Attorney as to the time of the passing was totally consistent with Petitioner's alibi defense. Her trial testimony was not. Yet after she had testified in conflict with what she had told the government prior to trial, the U. S. Attorney failed to make this statement available to the defense.

Petitioner contends that the government was required, upon hearing her *in court* testimony which was clearly inconsistent with her prior statements to the government prior to the trial to disclose those state-

ments to the Petitioner. This is particularly so in that in her prior statements, she indicated that the bill was passed at the precise time when the Petitioner and four others testified he was fifty miles away. Clearly then, the prior statements were both exculpatory and material. The fact that Petitioner's counsel was able to cross examine her regarding the time obviously did not cure the damage.

The statement is clearly exculpatory within the meaning of *Brady v. Maryland, supra*, and as such the Court of Appeals decision affirming the conviction is in conflict with a decision of this Court.

In the recent Third Circuit case of *U. S. ex rel Marzeno v. Gengler*, 574 F.2d 730 (3d Cir. 1978) the court ruled that evidence impeaching the testimony of a government witness falls within the *Brady* Rule. *Gengler, supra*, at 735. And while the court there holds that a violation of the *Brady* Rule does not automatically require reversal if the evidence would simply be cumulative, it does require reversal if the evidence was material to a finding of guilt. *Gengler, supra*, at 735.

In the instant case, nothing can be more material to the question of guilt then the time of the passing. As such, appropriate grounds exist for the granting of the writ.

The lower court, in its bench memorandum, totally misses the point when it observes that there was no prejudice to Petitioner by the government not disclosing these materially conflicting statements in that even if the passing as at 7:00 rather than 8:00, the Petitioner offered testimony as to where he was at 7:00—with his wife.

The point, however, is obtaining evidence to impeach the witness and cause the jury to believe that it was her earlier statements—that is a passing at 8:00 P.M.—which were correct and not her testimony that the passing was at 7:00. Again, he could not have both passed the bill and been at the restaurant with five witnesses at 8:00. He could, however, have passed it at 7:00 and been at the restaurant at 8:00 that evening.

As such, this clearly constitutes evidence which should have been disclosed within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963) and *U.S. ex rel Marzeno v. Gengler, supra.* As such, Petitioner respectfully requests that Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
RICHARD MARCHESE, *Defendant*
} Criminal No. 79-71

TRANSCRIPT OF PROCEEDINGS

Transcript of Bench Memorandum of the Court, beginning at 12:30 p.m. on February 6, 1981, United States District Court, Pittsburgh, Pennsylvania, Honorable Donald E. Ziegler, District Judge.

APPEARANCES:

On behalf of the Government:
Michael Cauley, Assistant United States Attorney

On behalf of the Defendant:
Paul Boas, Esquire

• • • • •

Defendant next asserts the Court erred in permitting reference during the trial to photographs taken by the Secret Service and the receipt as evidence of the photographic array.

It is settled that evidence of other offenses or a defendant's prior criminal record are not admissible in a criminal prosecution. *United States vs. Michelson*, 335 U.S. 469, 475 through 476 (1948).

In addition, the use of "mug shots" or use of the term "mug shot" creates undue prejudice, since it denotes prior criminal activity and thus is not admissible.

United States vs. Barnes, 365 F.2d 509 (D.C. Circuit, 1966).

In the instant case, we are not confronted with a situation in which a mug shot itself was introduced as evidence, as in *United States vs. Barnes, supra*, nor a situation in which the word "mug shot" was mentioned at trial, as in *United States vs. Reed*, 376 F.2d 226 (Seventh Circuit, 1967).

We also note that the trial record indicates only one instance in which mention is made that Mr. Marchese's photograph was taken by an agent of the Secret Service. That specific reference was made in cross examination of defendant, where the prosecution inquired, "Mr. Marchese, do you recall having your photograph taken by Dana Brown on February 9?" See Record at 209. Interestingly, the government never mentioned the Secret Service nor referred to Dana Brown as Agent Brown.

Since there is ample testimony that the pictures of defendant were taken on February 9, 1979, four days after the passing of the counterfeit note in Youngwood, the only inference which could be drawn by the jury was that the pictures were taken pursuant to the investigation of the instant case and nothing more.

Defendant relies on *United States vs. Harrington*, 490 F.2d 487, 494 (Second Circuit, 1973), for the proposition that introduction of the photographs of the defendant after an in-court identification had been made was reversible error.

We find no error here.

First, the keystone of the government's case was proper identification, and thus it was important to show that the defendant appeared virtually the same on February 9, 1979, as he did on February 5.

Second, the photographs themselves do not imply that Mr. Marchese had any prior criminal record.

Finally, unlike *Barnes*, there was no indication that the admission of the photographs in any way focused the jury's attention on the source of the pictures.

Clearly, the probative value of the photographs outweighed their potential for prejudice.

Defendant next claims that the government possessed statements by Diane Klingensmith which were exculpatory in nature and thereby violative of *Brady vs. Maryland*, 373 U.S. 83 (1963), and Rule 12.1(b) of the Federal Rules of Criminal Procedure.

We find this claim to be without merit.

Diane Klingensmith testified that the passing of the counterfeit $100 bill on February 5, 1979, occurred between 7:00 and 8:00 p.m. However, prior to trial, during personal interviews as well as at the previous trial in which she testified, she stated that the passing occurred between 7:40 p.m. and 8:20 p.m., or 8:00 p.m., or twenty minutes either way.

Defendant now contends that he prejudicially relied on the statement contained in the government's demand for an alibi defense, which specified between 7:40 and 8:20 p.m. on February 5, 1979.

Defendant claims prejudice on the ground that he sought alibi witnesses as to his whereabouts between the hours of 7:40 and 8:20 p.m., and not between 7:00 and 8:00 p.m.

The record shows, however, that defendant's alibi witnesses covered a span in their testimony from approximately 5:00 p.m. to 2:00 a.m. For example, Marsha Marchese, 5:00 p.m. to 2:00 a.m.; Mr. Aquiline, 7:30 p.m.

to 10:00 p.m.; Mr. Frank Tigano, 8:15 p.m. to 2:00 a.m.; and Mr. William Tigano, 9:45 to 2:00 a.m.

There exists no legitimate basis for a claim of prejudice under these circumstances.

Further, the Court in *Brady* held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. *Id.* at 87.

Defendant overlooks two crucial factors, however: (1) The government was just as surprised as the defendant when Klingensmith altered her testimony regarding the time of the passing, and (2) the defendant was aware that Klingensmith's testimony was inconsistent with that which she previously gave.

The record indicates that defense counsel not only cross examined Diane Klingensmith diligently regarding her prior testimony, but in fact read verbatim from her testimony given at the previous trial.

There was no suppression by the government of evidence favorable to the defendant.

Further, we find the prosecution had no duty at trial to offer the defendant information of which it already had knowledge, and the defendant had ample opportunity to explore any differing statement of the witness and did so, as the record reflects.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA
vs.
MARCHESE, RICHARD, *Appellant.*
No. 81-1431

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. 79-00071)

Submitted Under Third Circuit Rule 12(6)
September 24, 1981

Before: ALDISERT, HIGGINBOTHAM, and SLOVITER, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the out of court photographic identification made by witness Klingensmith was impermissibly suggestive and should have been suppressed, that (2) references to the photos throughout the trial, implying prior criminal activity, was prejudicial, that (3) insufficient evidence existed to sustain a conviction because of failure to identify appellant, that (4) insufficient evidence of knowledge that the bill was counterfeit existed to sustain a conviction, that (5) the court below should have granted an acquittal in the first trial of this matter as to the third count of the indictment in that the Government failed to prove that the bill was passed in Altoona, Pa., that (6) the court below erred in allowing improper rebuttal testimony and other testimony in violation of Rule 12.1 of the Federal Rules of Criminal Procedure, that (7) the court below erred in not reversing the conviction

upon the discovery of *Brady* material that was withheld by the prosecution, and that (8) the Government violated the court's ruling in limine which ordered all references to message parlors excluded, and for the reasons expressed in the opinion of the Honorable Donald E. Ziegler, district judge, in *United States v. Marchese*, Crim. No. 79-71 (W.D.Pa. Feb. 6, 1980), *reprinted in* App. at 379A; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By The Court,
/s/ ALDISERT
Circuit Judge

Attest:
/s/ SALLY MRVOS
Clerk
DATED: SEP 24, 1981
Certified as a true copy and issued in lieu of a formal mandate on November 12, 1981.

Test:
/s/ M.

Chief Deputy Clerk United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA vs. MARCHESE, RICHARD, *Appellant.*	No. 81-1431

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by RICHARD MARCHESE, appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: November 3, 1981